Supreme Court, U.S.
FILED
MAR 3 - 2004
OFFICE OF THE CLERK

(33) (32)

Nos. 03-334 and 03-343

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

FAWZI KHALID ABDULLAH FAHAD AL ODAH,
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

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BRIEF FOR THE RESPONDENTS

This case arises in the midst of the global armed conflict in which the United States is currently engaged against the al Qaeda terrorist network and its supporters. At issue is whether U.S. courts have jurisdiction to consider challenges to the detention of aliens who were captured abroad in connection with the ongoing combat operations in Afghanistan and determined to be enemy combatants, and who are being detained by the U.S. military to prevent them from rejoining the conflict and for other military purposes at the U.S. Naval Base at Guantanamo Bay, Cuba. Applying the principles recognized by this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the court of appeals correctly held that U.S. courts lack jurisdiction over such claims.

STATEMENT

1. a. On September 11, 2001, the United States experienced the most deadly and savage foreign attack on civilian lives and property and its commercial and government infrastructure in one day in the Nation's history. Two jumbo commercial airliners loaded with passengers and jet fuel were hijacked by agents of the al Qaeda terrorist network and launched as missiles in the early morning business hours into two of the largest office buildings in the United States in the heart of New York City; another jumbo airliner was hijacked and flown into the heart of the Department of Defense at the Pentagon; and a fourth jumbo airliner was brought down in Pennsylvania due to efforts of passengers, saving another target presumed to be the U.S. Capitol or the White House. Approximately 3000 people were killed, thousands more were injured, hundreds of millions of dollars of property was destroyed, and the U.S. economy was severely damaged.

In response, the President, acting as Commander in Chief, took action to defend the country and to prevent additional attacks. Congress supported the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks * * * or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224. Congress also emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Ibid.*

The President dispatched the U.S. armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported it. During the course of those operations, U.S. and coalition forces have removed the Taliban from power, eliminated the "primary

source of support to the terrorists who viciously attacked our Nation on September 11, 2001" and "seriously degraded" al Qaeda's training capability. Office of the White House Press Secretary, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate* (Sept. 19, 2003) (<www.whitehouse.gov/news/releases/2003/09/20030919-1.html>). However, "[p]ockets of al Qaeda and Taliban forces remain a threat to United States and coalition forces and to the Afghan government," and "[w]hat is left of both the Taliban and the al Qaeda fighters is being pursued actively and engaged by United States and coalition forces." *Ibid.*

An American-led force of approximately 11,500 soldiers and a NATO-led force of 5000 remain engaged in active combat operations in Afghanistan. Fighting has intensified in recent months, as al Qaeda and Taliban combatants have continued to launch attacks on U.S. troops, foreign aid workers, and Afghan government officials.[1] At the same time, Osama bin Laden, the leader of al Qaeda, has continued to call on al Qaeda and its supporters to continue their terrorist holy war, or jihad, against the United States, and the United States and other nations have been subject to attacks throughout the world. See, *e.g.*, *Tape urges Muslim fight against U.S.* (Feb. 2, 2003) (<www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html>); see also *Transcript of Osama Bin Laden Tape Recording* (Feb. 11, 2002) ("[W]e should drag the forces of the enemy into a protracted, weakening, and long fight.").[2]

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[1] See, e.g., *Afghan Attack Follows An Upsurge in Threats: Taliban Role in Question as 12 Are Arrested*, Wash. Post, Feb. 24, 2004, at A12; *Pakistan to Step Up Border Operations With U.S. Help, Army Preparing Major Assault Against Taliban, Al Qaeda*, Wash. Post, Feb. 23, 2004, at A14; *Ambush Kills Four Afghan Aid Workers*, Wash. Post, Feb. 15, 2004, at A24; Barbara Starr, *U.S. eyes spring offensive in Afghanistan: Hunt for bin Laden focuses on eastern Afghanistan* (Jan. 29, 2004) (<www.cnn.com/2004/WORLD/asiapcf/01/28/afghanistan.us/index.html>).

[2] In a recently released audiotape, a voice believed to be that of one of Osama bin Laden's top lieutenants stated that "the situation is not stable

b. U.S. and coalition forces have captured or taken control of thousands of individuals in connection with the ongoing hostilities in Afghanistan. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and prevent additional attacks. The military's authority to capture and detain such combatants is both well-established and time-honored. See, *e.g.*, *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313-314 (1946); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.8 (1942); *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 465-466 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004); 2 L. Oppenheim, *International Law* 368-369 (H. Lauterpacht ed., 7th ed. 1952); William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920).

Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual is "part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States." Dep't of Defense, *Fact Sheet: Guantanamo Detainees* (<www.defenselink.mil/news/detainees.

in Afghanistan," and threatened: "Bush, fortify your targets, tighten your defense, intensify your security measures, because the fighting Islamic community—which sent you New York and Washington battalions—has decided to send you one battalion after the other, carrying death and seeking heaven." *Qaeda Tapes Taunt U.S., France* (Feb. 24, 2004) (<www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>).

html.>) (*Guantanamo Detainees*).[3] Individuals who are not enemy combatants are released by the military.

Individuals who are determined to be enemy combatants are sent to a centralized holding in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews of the detainee. That screening team looks at the circumstances of capture, the threat the individual poses, his intelligence value, and with the assistance from other U.S. government officials on the ground, determines whether continued detention is warranted. Detainees whom the U.S. military determines, after conducting this screening process, have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention at Guantanamo are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and released from U.S. custody. See *Guantanamo Detainees*, *supra*.

c. Only a small fraction of those captured in connection with the current conflict and subjected to this screening process have been designated for detention at Guantanamo. Upon their arrival at Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. That assessment is based on information obtained from the field, detainee interviews, and intelligence and law enforcement sources. In addition, there is a thorough process in place for determining whether a de-

[3] Additional information on the military's screening procedures and the Guantanamo detentions is available at Department of Defense, *Detainees at Guantanamo Bay* (<www.defenselink.mil/news/detainees.html>); *Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce* (Feb. 13, 2004) (<www.defenselink.mil/transcripts/2004/tr20040213-0445.html>); *Briefing on Detainee Operations at Guantanamo* (Feb. 13, 2004) (<www.defenselink.mil/transcripts/2004/tr20040213-0443.html>).

tainee may be released or transferred to another government, consistent with the interests of national security. That process includes an initial review by a team of interrogators, analysts, behavioral scientists, and regional experts, and a further round of review by the commander of the Southern Command, who forwards a recommendation to an interagency group composed of representatives from, *inter alia*, the Department of Defense, Department of Justice, and Department of State. The recommendation is then reviewed by the Secretary of Defense or his designee. See *Guantanamo Detainees*, *supra*.[4]

The military is currently detaining about 650 aliens at Guantanamo. They include direct associates of Osama Bin Laden; al Qaeda operatives with specialized training; bodyguards, recruiters, and intelligence operatives for al Qaeda; and Taliban leaders. The intelligence gathered at Guantanamo has been vital to the ongoing combat operations in Afghanistan and elsewhere around the world, and to efforts to disrupt the al Qaeda terrorist network and prevent additional attacks on the United States and its allies. Among other things, Guantanamo detainees have revealed al Qaeda leadership structures, funding mechanisms, training and selection programs, and potential modes of attack. In addition, detainees have provided a continuous source of information to confirm other intelligence reports concerning unfolding terrorist plots or other developments in the conflict. See *Guantanamo Detainees*, *supra*.

The President has determined that neither al Qaeda nor Taliban detainees are entitled to prisoner-of-war status

[4] In addition to these existing procedures, the Department of Defense has recently announced that it will, on a going-forward basis, establish administrative review boards to review at least annually the need to detain each enemy combatant. Detainees will be afforded an opportunity to appear before the panel and the detainee's foreign government will be able to submit information to the panel. The panel will make an independent recommendation on whether continued detention is appropriate. See Dep't of Defense, *News Release* (Mar. 3, 2004) (<www.defenselink.mil/releases/2004/nr20040303-0403.html>).

under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. No. 972 (GPW). See *Guantanamo Detainees*, *supra*; Office of the White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo* (Feb. 7, 2002) (<www.whitehouse.gov/news/releases/2002/02/20020207-13.html>); note 18, *infra*. However, the Department of Defense has made clear that it is treating detainees at Guantanamo humanely and providing them with many privileges similar to those accorded to prisoners of war, including three meals a day that meet Muslim dietary laws, specialized medical care, religious worship privileges, means to send and receive mail, and visits from representatives of the International Red Cross. See *Guantanamo Detainees*, *supra*; C.A. App. 153-154.

The Guantanamo detentions already have been the subject of extensive diplomatic discussions between the Executive and officials of the foreign governments of detainees' home countries. To date, more than 90 detainees have been released (or designated for release) from Guantanamo to foreign governments. See note 25, *infra*. In addition, the President has determined that six detainees are subject to the Military Order of November 13, 2001, making them eligible for prosecution by a military commission for violations of the laws of war. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001). The United States has charged two of those detainees with conspiracy to commit war crimes. See *Guantanamo Detainees Charged With Conspiracy to Commit War Crimes* (Feb. 24, 2004) (<www.dod.mil/news/Feb2004/n02242004_200402246.html>).

d. The Guantanamo Naval Base is located on a natural harbor along the southeast coast of the Republic of Cuba. The United States occupies and operates the base pursuant to a Lease Agreement with Cuba, which was executed in 1903 in the aftermath of the Spanish-American War. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (1903 Lease Agreement).

The 1903 Lease Agreement was reaffirmed by a 1934 treaty, which extended the terms of the lease "[u]ntil the two contracting parties agree to the modification or abrogation of the stipulations." Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866.

Under the 1903 Lease Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased area]," and "Cuba consents that during the period of the occupation by the United States of said areas * * * the United States shall exercise complete jurisdiction and control over and within said areas." 1903 Lease Agreement art. III. A supplemental agreement specifies that the United States agrees to pay Cuba an annual sum (at that time, $2000) as long as it "shall occupy and use" Guantanamo under the 1903 Lease Agreement. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, art. I, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease). The Supplemental Lease also states that the United States may not permit anyone "to establish or maintain a commercial, industrial or other enterprise" on Guantanamo and establishes other terms and restrictions governing the United States' occupancy of Guantanamo. *Id.* art. III.

2. This litigation involves three actions brought in the District Court for the District of Columbia against the President, Secretary of Defense, and other military commanders on behalf of certain named aliens who were captured overseas in connection with the fighting in Afghanistan and transferred to Guantanamo.

a. On February 19, 2002, the parents of four British and Australian nationals at Guantanamo filed a next-friend petition for habeas corpus on behalf of those detainees. *Rasul* v. *Bush* (No. 03-334). Petitioners Shafiq Rasul and Asif Iqbal were recently designated for release to the custody of Great Britain (although they remain at Guantanamo pending release). Petitioner David Hicks, an Australian, has been designated by the President under the November 13, 2001 mili-

tary order. As a result, the Department of Defense may charge Hicks with a violation of the laws of war before a military commission, and Hicks has been permitted to meet with a military counsel, civilian counsel, and a foreign attorney consultant. The amended petition in *Rasul* (J.A. 74-101), *inter alia*, challenges the legality of the aliens' detention, seeks their release, and seeks an order barring interrogations and granting them access to counsel. J.A. 96-98.

b. On May 1, 2002, the family members of 12 Kuwaiti nationals detained at Guantanamo filed *Al Odah* v. *United States* (No. 03-343). Although their complaint (see J.A. 14-35) invokes jurisdiction under, *inter alia*, the habeas statute, the *Al Odah* petitioners declined to style their suit as a habeas petition and instead purport to challenge the legality of the detainees' detention under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, Alien Tort Statute, 28 U.S.C. 1350, and directly under the Fifth Amendment to the Constitution. They seek, *inter alia*, an order declaring that the aliens' detention is arbitrary and unlawful, and providing the detainees with access to counsel. J.A. 34.

c. On June 10, 2002, the wife of another Guantanamo detainee, Mamdouh Habib, filed a petition for habeas corpus on his behalf. *Habib* v. *Bush* (consolidated with *Rasul*, No. 03-334). Habib is an Australian national who was initially taken into custody by Pakistani and Egyptian authorities near the border of Afghanistan, and was transferred to the control of the U.S. military. The habeas petition in *Habib* (see J.A. 106-127), *inter alia*, challenges the legality of Habib's detention, seeks his immediate release, and seeks an order enjoining the military from interrogating Habib and granting him access to counsel. J.A. 121-125.

3. The government moved to dismiss all three actions for lack of subject-matter jurisdiction. As the government explained in its motions to dismiss, under the principles recognized by this Court in *Johnson* v. *Eisentrager*, *supra*, U.S. courts lack jurisdiction over claims filed on behalf of the Guantanamo detainees because they are aliens with no

connection to the United States, and they are being detained outside of the sovereign territory of the United States. The district court agreed that "*Eisentrager*, and its progeny, are controlling" (Pet. App. 48a (citation omitted)), and dismissed for lack of jurisdiction. *Id.* at 32a-64a.

4. The court of appeals affirmed. Pet. App. 1a-29a. The court concluded that "the detainees [in this case] are in all relevant respects in the same position as the prisoners in *Eisentrager*" and thus held that, under the fundamental principles established by this Court in *Eisentrager*, "the [United States] courts are not open to them." *Id.* at 18a. As the court explained, like the prisoners in *Eisentrager*, the Guantanamo detainees "too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States." *Id.* at 10a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that U.S. courts lack jurisdiction over challenges to the legality of the detention of aliens captured abroad and detained by the U.S. military at the U.S. Naval Base at Guantanamo Bay, Cuba.

I. The fundamental jurisdictional question presented in this case is governed by this Court's decision in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, the Court held that U.S. courts lacked jurisdiction to consider a habeas petition filed on behalf of German nationals who had been seized overseas following the German surrender in World War II, tried by a military commission, and imprisoned at a U.S.-controlled facility in Germany. The Court concluded that neither the federal habeas statutes nor the Constitution conferred such jurisdiction. In addition, the Court emphatically rejected the argument that the Fifth Amendment confers rights on aliens held outside the sovereign territory of the United States. *Id.* at 784.

Subsequent developments have only reinforced *Eisentrager*'s analytical foundation. First, Congress has not amended the habeas statutes to confer the jurisdiction that this Court held was absent in *Eisentrager* and, indeed, did not enact a proposed amendment in the wake of *Eisentrager* that would have explicitly conferred such jurisdiction. Second, this Court has repeatedly reaffirmed *Eisentrager*'s constitutional holding that the Fifth Amendment does not apply to aliens abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990). Third, the U.S. military has detained thousands of aliens abroad in connection with several conflicts since 1950, but the U.S. courts have not entertained any habeas petition filed on such an alien's behalf.

Eisentrager controls the outcome in this case. The Guantanamo detainees, like the detainees in *Eisentrager*, are aliens who were captured overseas in connection with an armed conflict and have no connection to the United States. In addition, the Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States. It is "undisputed" that Guantanamo is not part of the sovereign United States, Pet. App. 55a (district court), and that conclusion is compelled by the express terms of the Lease Agreements between the United States and Cuba and the Executive Branch's definitive construction of those agreements. Accordingly, U.S. courts lack jurisdiction to consider claims filed on behalf of aliens held at Guantanamo.

II. Petitioners' efforts to recast and evade this Court's decision in *Eisentrager* are unavailing. *Eisentrager* is not distinguishable on the ground that the Guantanamo Naval Base is under the control of the United States. *Eisentrager* itself makes clear that sovereignty, not mere control, is the touchstone of its jurisdictional rule. Thus, even though the U.S. military controlled the Landsberg prison in post-war Germany, the *Eisentrager* Court held that the alien prisoners in that facility lacked access to our courts because they were outside the sovereign territory of the United

States. The same is equally true with respect to the Guantanamo detainees.

Nor did the Court's jurisdictional ruling in *Eisentrager* turn on the fact that the prisoners were "enemy" aliens. *Eisentrager* addressed the restrictions on "the privilege of litigation" that apply to "aliens, *whether friendly or enemy*." 339 U.S. at 777-778 (emphasis added). Moreover, this Court has recognized in subsequent cases that *Eisentrager* is a seminal decision defining the rights of *all* aliens abroad, and not just "enemy" aliens. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). And, in any event, the detainees in this case —who were captured in connection with the fighting in Afghanistan and who have been determined by the U.S. military to be enemy combatants—plainly qualify as enemy aliens for any relevant purposes.

Petitioners also are mistaken in arguing that *Eisentrager*'s jurisdictional holding is conditioned on a threshold inquiry into the legality of an alien's detention under international law. There is no statutory, precedential, or historical basis for this Court to tie the availability of federal jurisdiction to the merits of a detainee's international law claims. That is especially true where, as here, the claims are based on international agreements—like the Geneva Convention—that, as *Eisentrager* recognized, are not privately enforceable in a court and instead are designed for enforcement through political and diplomatic channels.

III. Deviating from the principles recognized in *Eisentrager* in this case would raise grave constitutional concerns. The Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation's foreign affairs and military operations. Exercising jurisdiction over claims filed on behalf of aliens held at Guantanamo would place the federal courts in the unprecedented position of micro-managing the Executive's handling of captured enemy combatants from a distant combat zone where American troops are still fighting; require U.S. soldiers to divert their attention from the combat operations

overseas; and strike a serious blow to the military's intelligence-gathering operations at Guantanamo. At the same time, recognizing jurisdiction over petitioners' claims would intrude on Congress's ability to delineate the subject-matter jurisdiction of the federal courts.

IV. The Guantanamo detentions are the subject of intense diplomatic, congressional, and public consideration. As this Court observed in *Eisentrager*, a recognition of the established jurisdictional limits of the U.S. courts does not mean that detainees are without rights. Rather, the "responsibility for observance and enforcement" of the rights of aliens held abroad under the law of armed conflict "is upon political and military authorities," 339 U.S. at 789 n.14, not the courts.

ARGUMENT

U.S. COURTS LACK JURISDICTION TO CONSIDER CLAIMS FILED ON BEHALF OF ALIENS CAPTURED ABROAD AND HELD AT GUANTANAMO

As this Court has repeatedly reaffirmed, "[f]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted); see also *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-180 (1803). In *Eisentrager*, this Court held that neither the federal habeas statutes nor the Constitution itself supplied jurisdiction over claims filed by aliens who were captured and held abroad by the U.S. military. As both the court of appeals and the district court below recognized, *Eisentrager* thus governs the sole question presented in this case.

I. UNDER THE FUNDAMENTAL PRINCIPLES RECOGNIZED IN *EISENTRAGER*, U.S. COURTS LACK JURISDICTION OVER CLAIMS FILED ON BEHALF OF GUANTANAMO DETAINEES

A. In *Eisentrager*, The Court Held That U.S. Courts Lack Jurisdiction Over Suits Filed By Aliens Detained Abroad

1. *Eisentrager* arose from a petition for a writ of habeas corpus filed in the District Court for the District of Columbia by German nationals who had been seized by U.S. armed forces in China after the German surrender in World War II, tried by military commission, and detained at a prison controlled by the U.S. military in Landsberg, Germany. See 339 U.S. at 765-767. The prisoners alleged that their confinement violated the Fifth Amendment and other provisions of the Constitution, as well as the "laws of the United States and provisions of the Geneva Convention governing the treatment of prisoners of war." *Id.* at 767; see J.A. 136. They asserted jurisdiction under the federal habeas statutes as well as under the Constitution itself. See 49-306, *Johnson* v. *Eisentrager*, Br. for Resp. at 6, 9-13, 27-43.

The district court dismissed the habeas petition for lack of jurisdiction, but the court of appeals reversed. *Eisentrager* v. *Forrestal*, 174 F.2d 961 (D.C. Cir. 1949). The court of appeals reasoned that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Id.* at 963. The court explained that, in its view, "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an *omission* in a federal jurisdictional statute," and that, accordingly, jurisdiction exists to entertain a habeas petition filed by such an individual "in some district court by compulsion *of the Constitution itself*." *Id.* at 965, 966 (emphases added). The court rejected the notion that the fact that the prisoners

were aliens, and that they were captured and confined at all times outside the territory of the United States, in any way altered that conclusion. *Ibid.*

2. This Court reversed. In an opinion written by Justice Jackson, the Court held that U.S. courts lacked jurisdiction to consider the habeas petition in *Eisentrager* because the prisoners were aliens who were seized abroad and detained outside the sovereign territory of the United States.

In the first sentence of the Court's decision, the Court framed the basic question before it as "one of jurisdiction of civil courts." *Eisentrager*, 339 U.S. at 765. In the following pages, the Court repeatedly underscored the fundamental jurisdictional nature of its ruling. The Court referred in broad terms to the Judiciary's "power to act" vis-a-vis military authorities with respect to aliens held abroad, *id.* at 771; the standing of such individuals "to maintain any action in the courts of the United States," *id.* at 776; the "standing [of such individuals] to demand access to our courts," *id.* at 777; and the "capacity and standing [of such individuals] to invoke the process of federal courts," *id.* at 790. Similarly, the Court discussed "the privilege of litigation" in U.S. courts and the use of "litigation [as a] weapon" by aliens held by military authorities. *Id.* at 777-779.

In resolving that basic jurisdictional issue, the Court recognized that the federal habeas statutes did not grant jurisdiction over a petition filed on behalf of aliens held abroad. As the Court explained, whereas "Congress has directed our courts to entertain" certain actions on behalf of a citizen "regardless of whether he is within the United States or abroad," 339 U.S. at 769 (quoting 8 U.S.C. 903 (1946)), "[n]othing * * * in our statutes" supports the exercise of jurisdiction over a habeas petition filed on behalf of an alien held abroad. *Id.* at 768. Moreover, the Court continued, "*[a]bsence* of support from legislative or juridical sources" was "implicit" in the manner in which the court of appeals decided the case by reference to "fundamentals" rather than "to statutes." *Ibid.* (quoting *Eisentrager*, 174 F.2d at 963)

(emphasis added). The Court thus focused its analysis on the more "fundamental[]" question whether the Constitution somehow guaranteed jurisdiction over the prisoners' claims in the absence of any statute.[5]

The Court also rejected the court of appeals' conclusion that, "although no statutory jurisdiction * * * is given [in this context]," 339 U.S. at 767, aliens held abroad "are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*," *id.* at 777. The Court emphasized that aliens are accorded rights under the Constitution and federal law only as a consequence of their *presence* within the territory of the United States. See *id.* at 771. Accordingly, the Court explained that the "privilege of litigation" was unavailable to the aliens in *Eisentrager* because they "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-778. The Court also emphasized that, as aliens held abroad, the prisoners in *Eisentrager* had no Fifth Amendment rights to invoke. See *id.* at 781-783.

At the same time, the Court stressed the separation-of-powers problems inherent in any exercise of jurisdiction in this uniquely military context. The Court explained that judicial review of claims filed on behalf of aliens captured by the U.S. military and detained in connection with an armed conflict would directly interfere with the President's authority as Commander in Chief, which "has been deemed,

[5] The *Al Odah* petitioners suggest (at 28-29) that *Eisentrager* held only that jurisdiction was not available under one provision of the federal habeas statutes (28 U.S.C. 2243). That is incorrect. The prisoners in *Eisentrager* specifically argued that jurisdiction was conferred by "[t]he habeas corpus statute (28 U.S.C. §§ 2241-2255)." 49-306 Br. for Resp. at 6 (Summary of Argument); see also *id.* at 9 (arguing that Section 2241 supplied "jurisdiction to entertain the petition for the writ of habeas corpus in the case at bar"). In holding that the courts *lacked* jurisdiction, the Court necessarily rejected the prisoners' argument that Section 2241 *supplied* such jurisdiction.

throughout our history, as essential to war-time security." 339 U.S. at 774. Likewise, the Court observed that "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* at 779.

3. Ultimately, the Court's holding that it lacked jurisdiction rested on two considerations that led the Court to reject the idea that the Constitution itself supplied jurisdiction over the habeas petition at issue. First, the detainees in *Eisentrager* were aliens with no connection to the United States. Second, the detainees were taken into custody overseas and at all times were held outside the sovereign territory of the United States. As explained in Part I.C, *infra*, those same considerations compel the conclusion that U.S. courts lack jurisdiction over claims filed on behalf of aliens captured abroad in connection with the ongoing fighting in Afghanistan and detained at Guantanamo.

B. The Analytical Foundation Of *Eisentrager* Has Only Been Reinforced During The Past Half Century

In at least three key respects, the force of the Court's decision in *Eisentrager* has only grown with time.

1. As explained above, the Court in *Eisentrager* held that "nothing * * * in our statutes" conferred jurisdiction over the habeas petition at issue. 339 U.S. at 768. Congress is presumed to be aware of this Court's decisions. It has legislated in the area of federal habeas jurisdiction on several occasions since 1950. Yet Congress has never amended the habeas statutes to provide the jurisdiction that this Court held was absent in *Eisentrager*. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); see also *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993).

At the same time, the current habeas statute is "very much the same" as the statute in effect at the time of *Eisentrager*. Pet. App. 18a; see 49-306 U.S. Br. at 2-3 n.1. Section 2241 of title 28 has been amended only once since 1950. In 1966, Congress added subsection (d), which relates to federal jurisdiction over claims filed on behalf of prisoners detained pursuant to state-court convictions. See 28 U.S.C. 2241 amendments; Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811. Although Congress has narrowed federal habeas jurisdiction since 1950 over certain types of claims, see, *e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 811, it has never *broadened* habeas jurisdiction to cover the sort of claims at issue in *Eisentrager*.

There was, however, one failed legislative attempt to create such jurisdiction in the immediate aftermath of *Eisentrager*. In February 1951, a bill was introduced in Congress "[p]roviding for the increased jurisdiction of Federal courts in regard to the power to issue writs of habeas corpus in cases where officers of the United States are detaining persons in foreign countries, regardless of their status as citizens." H.R. 2812, 82d Cong., 1st Sess. The bill provided "[t]hat the district court of the United States is given jurisdiction to issue writs of habeas corpus inquiring into the legality of any detention by any officer, agent, or employee of the United States, *irrespective of whether the detention is in the United States or in any other part of the world, and irrespective of whether the person seeking the writ is a citizen or an alien.*" *Ibid.* (emphasis added). The bill was never voted out of committee, much less enacted into law.

Principles of separation of powers and stare decisis strongly counsel against revisiting *Eisentrager* and revising the habeas statutes in a manner that Congress itself considered and rejected. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("As we reaffirm today, considerations of *stare decisis* have added force in statutory cases because Congress may alter what we have done by amending the statute."); *id.* at 172; accord *Hilton* v. *South Carolina*

Pub. Ry., 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision * * * if it disagreed with it, and has chosen not to do so.").

Since *Eisentrager*, this Court also has repeatedly emphasized its reluctance to presume that Congress intends a federal statute to have extraterritorial application. As the Court observed in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), a case involving a challenge to the United States' treatment of Haitian refugees who were intercepted on the high seas and temporarily detained at Guantanamo, "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested," and "[t]hat presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility." *Id.* at 188 (citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). Those decisions bolster the *Eisentrager* Court's refusal to interpret the federal habeas statutes to confer jurisdiction over challenges by aliens held *outside* the United States.

2. During the past 50 years, the Court also has repeatedly reaffirmed the principle that the Fifth Amendment does not apply to aliens abroad. Three Terms ago in *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), the Court stated that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." In support of that proposition, the Court cited *Eisentrager* and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), with the parenthetical explanation that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. 533 U.S. at 693.

In *Verdugo-Urquidez*, 494 U.S. at 266, the Court held that the Fourth Amendment does not apply extraterritorially to a search or seizure of property owned by a nonresident alien outside the sovereign territory of the United States. The Court carefully grounded that decision on its precedents

recognizing that the Constitution does not extend "wherever the United States Government exercises its power" and, in particular, does not extend to aliens outside the sovereign territory of the United States. *Id.* at 269; see *id.* at 268-271. In illustrating that principle the Court relied on *Eisentrager*, which, the Court explained, "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Id.* at 269. As the Court stressed, *Eisentrager*'s "rejection of extraterritorial application of the Fifth Amendment was emphatic." *Ibid.*

The Court in *Verdugo-Urquidez* also reaffirmed the practical and separation-of-powers concerns underlying *Eisentrager*. The Court observed that, "[n]ot only are history and case law against [Verdugo-Urquidez], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." 494 U.S. at 273. As the Court explained, "[t]he United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security," and holding that the Constitution applied to aliens abroad "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-274. Any restrictions on the political branches' conduct of such foreign operations, the Court admonished, "must be imposed by the political branches through diplomatic understanding, treaty, or legislation," and not by the courts. *Id.* at 275. See also *DeMore* v. *Kim*, 123 S. Ct. 1708, 1730 (2003) (citing *Eisentrager*).

3. The actions of the U.S. armed forces and courts since *Eisentrager* also have reinforced the basic principles reflected in that decision. In *Eisentrager*, the Court emphasized that there was no historical practice of U.S. courts exercising jurisdiction over the claims of aliens held by the military outside the territory of the United States. See 339 U.S. at 768-777. Since *Eisentrager*, this Nation has engaged

the armed forces in numerous armed conflicts, including in Korea, Vietnam, Iraq, and Bosnia. The military has captured and detained thousands of aliens abroad in connection with those conflicts. Yet, until the Ninth Circuit's divided panel decision in *Gherebi* v. *Bush*, 352 F.3d 1278 (2003) (opinion by Reinhardt, J.), discussed *infra*, no court had ever recognized jurisdiction over a claim filed on behalf of such a detainee.[6]

C. Under Settled Law, U.S. Courts Lack Jurisdiction Over Claims Filed On Behalf Of Aliens Held At Guantanamo

Both the court of appeals (Pet. App. 18a) and the district court (*id.* at 62a) below carefully examined *Eisentrager* and correctly concluded that it applies with full force to the Guantanamo detainees. First, the Guantanamo detainees, like the detainees in *Eisentrager*, are aliens with no connection to the United States. The detainees at issue here are foreign nationals of Australia, Great Britain, and Kuwait. They were concededly captured in Afghanistan or Pakistan, taken into U.S. custody overseas, and were transferred to Guantanamo. See *Al Odah*, No. 03-343 (AO) Br. 2; *Rasul*, No. 03-334 (R.) Br. 3.

Second, the Guantanamo detainees, like the detainees in *Eisentrager*, are being held by the U.S. military outside the sovereign territory of the United States. As the district court stated, "[i]t is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States." Pet. App. 55a. That conclusion is compelled by the terms of the Lease Agreements pursuant to which the United States occupies Guantanamo, and the Executive Branch's definitive construction of those agreements. As

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[6] In its brief in *Eisentrager*, the government explained that any attempt to exercise habeas jurisdiction over aliens held by the U.S. military in the territory of another country would be inconsistent with the territorial reach of the writ of habeas corpus at common law. See 49-306 U.S. Br. at 33-49. Certainly nothing has changed since *Eisentrager* that would call into doubt the traditional limits on the writ at common law.

discussed above, although Cuba "consents" to permit the United States to "exercise complete jurisdiction and control" of the base, the 1903 Lease Agreement explicitly provides that Cuba retains "ultimate sovereignty" over the naval base. 1903 Lease Agreement art. III, *supra*.

The 1903 Lease Agreement was executed in both English and Spanish, and both authoritative texts confirm Cuba's ongoing sovereignty over Guantanamo Bay. The Spanish phrase in Article III for "ultimate sovereignty" is "soberania definitiva." The word "definitiva" belies petitioner's assertion that "ultimate" as used in Article III means only "eventual." Instead, it is defined in *Diccionario Salamanca* 472 (1996) as "que no admite cambios," or, in English, "not subject to change." Similarly, "ultimate" itself is more naturally defined in this context as "basic, fundamental, original, primitive." *Webster's Third New International Dictionary* 2479 (1993). As this Court explained in *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833), "[i]f the English and the Spanish parts [of a treaty] can, without violence, be made to agree, that construction which establishes this conformity ought to prevail." Thus, the terms "definitiva" and "ultimate" are equally understood to affirm Cuba's sovereignty over the leased territory.[7]

Other provisions of the Lease Agreements are consistent with the conclusion that Cuba retained sovereignty over Guantanamo. For example, the 1903 Lease Agreement states that the United States only may exercise jurisdiction and control over Guantanamo "during the *period* of [its] occupation" of Guantanamo. 1903 Lease Agreement art. III (emphasis added). That language is consistent with the understanding that the United States will not *always* occupy Guantanamo.[8] Moreover, the Supplemental Lease imposes conditions on the United States' use of Guantanamo that belie any claim that the United States is *sovereign* over Guantanamo. For example, the Supplemental Lease specifies that the United States may not use Guantanamo for "commercial" or "industrial" purposes. Supplemental Lease, art. III.

As this Court has explained, the "determination of sovereignty over an area is for the legislative and executive departments," and not a question on which a court may second-guess the political branches *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380 (1948); cf. *Jones* v. *United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."). More generally, the Court has acknowledged that the Framers of our Constitution sought to ensure that the Executive "speak[s] for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Counsel*, 530 U.S. 363, 381 (2000).[9]

In *Gherebi* v. *Bush*, *supra*, a divided panel of the Ninth Circuit held "that, *at least for habeas purposes*, Guantanamo is a part of the sovereign territory of the United States."

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[7] Furthermore, as noted above, the 1903 Lease Agreement states that "the United States recognizes the *continuance* of the ultimate sovereignty of the Republic of Cuba over [Guantanamo]." 1903 Lease Agreement art. III (emphasis added). As Judge Graber explained in *Gherebi*, "the Lease's use of the word 'continuance' denotes the *ongoing* nature of Cuba's 'ultimate sovereignty' over Guantanamo," and bolsters the conclusion that Cuba retained such sovereignty. 352 F.3d at 1307 (emphasis in original).

[8] Indeed, in 1996 Congress declared that it is "[t]he policy of the United States * * * [t]o be prepared to enter into negotiations with a democratically elected government in Cuba either to return the United States Naval Base at Guantanamo to Cuba or to renegotiate the present agreement under mutually agreeable terms." 22 U.S.C. 6061(12).

[9] The Executive Branch opinions cited by petitioners (R. Br. 43) are not to the contrary. Indeed, those opinions, which address issues far afield from the question presented here, specifically recognize that the United States' Lease Agreements with Cuba reserve to Cuba the "ultimate sovereignty" over Guantanamo, 35 Op. Att'y Gen. 536, 537 (1929) (quoting Lease Agreement), and that, under those agreements, Guantanamo thus lies "*outside* the territorial United States," 6 Op. Off. Legal Counsel 236, 238 (1982) (emphasis added).

352 F.3d at 1290 (emphasis added). This Court has never distinguished between sovereignty *for habeas purposes* and sovereignty *for all other purposes*. Moreover, the judicial recognition of even limited sovereignty in contravention of the Executive's position is problematic. As Judge Graber observed in *Gherebi*, "[t]he majority today declares that the United States has sovereignty over territory of a foreign state, over the objections of the executive branch," and despite the fact that "both parties to the Guantanamo Lease and its associated treaties—Cuba and the United States (through the executive branch)—maintain that Guantanamo is part of *Cuba*." *Id.* at 1312. In light of those practical problems and the unambiguous terms of the Lease Agreements, there is no basis for adopting the Ninth Circuit's novel conception of sovereignty.[10]

* * * * *

In short, the same principles on which *Eisentrager* is grounded compel the conclusion that U.S. courts lack

[10] In *Gherebi*, the Ninth Circuit (Judge Reinhardt, joined by Senior District Judge Shadur) held that *Eisentrager* does not apply to the Guantanamo detainees either (1) because the United States exercises sovereignty over Guantanamo "at least for habeas purposes," 352 F.3d at 1290, an argument that fails for the reasons discussed above, and that petitioners themselves have not advanced in this case; or (2) because the United States exercises territorial jurisdiction and control over Guantanamo, an argument that fails for the reasons discussed below (Part II.B, *infra*). Judge Graber dissented in *Gherebi*, concluding that *Eisentrager* was controlling. 352 F.3d at 1305. The other lower courts to have considered the issue have agreed with Judge Graber's view. See Pet. App. 18a (D.C. Circuit); *id.* at 62a (Judge Kollar-Kotelly); *Coalition of Clergy* v. *Bush*, 189 F. Supp. 2d 1036, 1046-1050 (C.D. Cal.) (holding that Guantanamo detainees are similar "[i]n all key respects" to the prisoners in *Eisentrager*), aff'd in part and vacated in part, 310 F.3d 1153, 1164 n.4 (9th Cir. 2002) (observing in dictum "[*Eisentrager*] well matches the extraordinary circumstances" of the Guantanamo detentions), cert. denied, 123 S. Ct. 2073 (2003); *Gherebi* v. *Bush*, 262 F. Supp. 2d 1064, 1066-1067, 1069-1071 (C.D. Cal.) (*Eisentrager* "compels dismissal" of the petition filed on behalf of a Guantanamo detainee), rev'd, 352 F.3d 1278 (9th Cir. 2003).

jurisdiction over claims filed on behalf of aliens captured abroad and detained at Guantanamo.

II. PETITIONERS' ATTEMPTS TO RELITIGATE AND EVADE *EISENTRAGER* ARE UNAVAILING

None of the petitioners in this case has suggested that *Eisentrager* is no longer good law, much less formally requested this Court to revisit the result or reasoning of *Eisentrager*. Instead, petitioners focus their efforts, first, on renewing the central statutory argument made and rejected in *Eisentrager* and, second, on attempting to circumvent *Eisentrager* based on factual distinctions that are of no consequence under *Eisentrager*'s own terms.

A. Petitioners' Overarching Statutory Arguments Cannot Be Reconciled With *Eisentrager*

Petitioners first urge a construction of the habeas statutes that essentially ignores, and in any event cannot be reconciled with, this Court's decision in *Eisentrager*. Petitioners' central submission to this Court is that Congress has "expressly" granted jurisdiction over the claims at issue. AO Br. 13; see *id.* at 17- 25; R. Br. 11-30. In particular, petitioners argue that "[t]he district court had jurisdiction over the petitions for habeas corpus pursuant to 28 U.S.C. § 2241," which "grants the federal courts power to review Executive detentions 'in violation of the Constitution or laws or treaties of the United States.'" R. Br. 7 (quoting 28 U.S.C. 2241(c)(3)); see AO Br. 15-17. That argument was unavailing at the time of *Eisentrager* and, in the wake of *Eisentrager* and the statutory history discussed in Part I.B above, the argument is no more availing today.

The *Eisentrager* Court held that "[n]othing * * * in our statutes" confers jurisdiction over a claim filed on behalf of an alien who "at no relevant time" has been within the sovereign territory of the United States. 339 U.S. at 768. That holding was necessary to the Court's conclusion that it lacked jurisdiction in *Eisentrager*. The current version of Section 2241 is the same in all pertinent respects as the

statute in effect at the time of *Eisentrager*. Pet. App. 18a. Accordingly, Section 2241 cannot confer any jurisdiction today that it did not supply then. That conclusion is only bolstered by the fact that the one bill that was introduced in the wake of *Eisentrager* that *would* have purported to confer the type of habeas jurisdiction that this Court found absent in *Eisentrager* languished in committee. See Part I.B, *supra*.

Petitioners contend that the habeas statute must be read to confer jurisdiction over the claims at issue in this case in order to avoid "serious constitutional problem[s]" under the Fifth Amendment. R. Br. 10 (quoting *Zadvydas*, 533 U.S. at 692); see *id.* at 17; see AO Br. 23-24. That argument, too, cannot be reconciled with *Eisentrager*. As discussed above, this Court rejected the argument that, "although no statutory jurisdiction * * * is given [in this context]," *Eisentrager*, 339 U.S. at 767, aliens held abroad nonetheless "are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*," *id.* at 777. Moreover, to the extent that petitioners argue that the Fifth Amendment should influence the Court's interpretation of the habeas statutes, that argument also was raised and soundly rejected in *Eisentrager*.

The *Eisentrager* Court held that the Fifth Amendment—the provision on which petitioners base their constitutional-avoidance argument—does not apply extraterritorially to aliens held outside the sovereign United States. See 339 U.S. at 781-783. This Court has repeatedly affirmed that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. *Zadvydas*, 533 U.S. at 693. Those constitutional protections therefore do not extend across the Florida Strait to Cuba, including the sovereign territory of Cuba that the United States occupies at Guantanamo under the terms of its Lease Agreements with Cuba.

The *Rasul* petitioners argue (Br. 21) that holding that U.S. courts lack jurisdiction over habeas petitions filed on behalf of aliens held abroad "would raise grave constitutional

doubts under the Suspension Clause." See U.S. Const. Art. I, § 9, Cl. 2. That argument is refuted by *Eisentrager* as well. One of the principal arguments made in *Eisentrager* was that the Suspension Clause required the courts to exercise jurisdiction (see 49-306 Br. for Resp. at 27-42), and both the court of appeals' decision in *Eisentrager* (see 174 F.2d at 965-966 & n.20) and the opinion of the dissenting Justices in *Eisentrager* (see 339 U.S. at 791 n.1, 798) were premised on that erroneous understanding. The Court in *Eisentrager*, however, rejected the argument that the "prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*." *Id.* at 777.

Nothing in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), on which petitioners rely (R. Br. 21-22; AO Br. 18), is to the contrary. *St. Cyr* holds only that, absent a clear statement from Congress, statutes should be interpreted not to repeal pre-existing habeas corpus jurisdiction in order to avoid raising constitutional problems. See 533 U.S. at 298-303. But there is no constitutional problem to "avoid" here. This Court held in *Eisentrager* that "[n]othing in the text of the Constitution" extends a right to petition for habeas corpus to aliens abroad, "nor does anything in our statutes." *Eisentrager*, 339 U.S. at 768. Giving non-resident aliens a right to habeas corpus far from avoiding any constitutional problems would contravene long-settled precedent. See *id.* at 769, 776-777. Accordingly, *St. Cyr*'s interpretive principles are inapplicable here. See 533 U.S. at 299-303.

The more relevant interpretative principle is this Court's warning in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959), about the "discovery of new, revolutionary meaning in reading an old judiciary enactment." This Court should reject petitioners' invitation to discover a "revolutionary" new component of federal jurisdiction—the judicial power to review claims filed on behalf of aliens held by the U.S. military abroad in connection with an armed conflict—that not only never has been recognized in the past

but was expressly rejected by this Court more than 50 years ago in *Eisentrager*. 339 U.S. at 768.[11]

B. There Is No Basis For Carving A "Guantanamo Exception" Out Of *Eisentrager*'s Sovereignty-Based Rule

Although they have conceded that Guantanamo is outside the sovereignty territory of the United States, Pet. App. 55a, petitioners nonetheless argue that *Eisentrager* is inapplicable on the ground that Guantanamo is "under U.S. jurisdiction and control." See AO Br. 34; see *id.* 34-38; R. Br. 41-46. The panel majority in *Gherebi* distinguished *Eisentrager* on similar grounds. See 352 F.3d at 1286-1290. For several reasons, the courts below (see Pet. App. 14a-17a; *id.* at 55a-63a), as well as Judge Graber in *Gherebi* (see 352 F.3d at 1305-1306), correctly rejected that argument.

1. To begin with, petitioners' argument cannot be squared with *Eisentrager*'s own terms. As discussed above, *Eisentrager* makes clear that its jurisdictional holding is based on sovereignty, and not on malleable concepts like de

[11] The *Al Odah* petitioners also suggest that the federal question statute (28 U.S.C. 1331) supplies the jurisdiction that this Court held was absent in *Eisentrager*, suggesting that "this is a routine APA case in which the federal courts have jurisdiction under section 1331." See AO Br. 13-15. That argument fails. In *Eisentrager*, the Court stated in broad terms that "[n]othing * * * in our statutes" confers jurisdiction over a claim filed on behalf of an alien who "at no relevant time" has been within the sovereign territory of the United States. 339 U.S. at 768. It is unimaginable that the Court that reached that fundamental conclusion in *Eisentrager* would have permitted the same prisoners to invoke the jurisdiction of the U.S. courts if they had simply asserted jurisdiction under the federal question statute (which has been in effect since 1875). Furthermore, giving effect to petitioners' reading of Section 1331 would mean that U.S. courts would have jurisdiction to entertain a lawsuit filed by an alien anywhere in the world, including on the battlefield in Afghanistan, as long as the action challenges a violation of federal law. Jurisdictional statutes are subject to the same presumption against extraterritoriality as other statutes. There is no indication in the text or history of Section 1331 that Congress intended it to apply extraterritorially, and any such application would raise serious constitutional concerns in cases, such as this one, that challenge the Executive's conduct of foreign affairs.

facto control. See Pet. App. 16a; *id.* at 55a; *Gherebi*, 352 F.3d at 1305 ("A straightforward reading of [*Eisentrager*] makes it clear that 'sovereignty' is the touchstone * * * for the exercise of federal courts' jurisdiction.") (Graber, J., dissenting). In particular, in explaining why "the privilege of litigation" did not extend to the aliens in *Eisentrager*, the Court stated that the "prisoners at no relevant time were within any *territory over which the United States is sovereign*." 339 U.S. at 777-778 (emphasis added).

The *Eisentrager* Court's treatment of *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946), underscores that sovereignty, not merely jurisdiction or control, is the key, and that petitioners' efforts to rely on cases like *Quirin* and *Yamashita* are misguided. In *Quirin* and *Yamashita*, the Court exercised jurisdiction over habeas petitions of enemy aliens (and, in *Quirin*, an enemy combatant who was presumed to be a U.S. citizen). The *Eisentrager* Court, however, distinguished those cases on the ground that the aliens were captured and detained *within* U.S. territory. As the Court noted, *Quirin* was brought by aliens who were apprehended "in the United States." 339 U.S. at 780. Similarly, the habeas petition in *Yamashita* was brought by an alien who was captured and detained in the Philippine Islands—then an insular possession of the United States. As the Court explained, "[b]y reason of our *sovereignty* at that time over these insular possessions, Yamashita stood much as did Quirin before American courts"—*i.e.*, he was "within territory of the United States." *Ibid.* (emphasis added). The dissenters in *Eisentrager* likewise understood that sovereignty was the key to the Court's distinction of *Quirin* and *Yamashita*. See *id.* at 795 ("Since the Court expressly disavows conflict with the *Quirin* and *Yamashita* decisions, it must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory."). *Eisentrager*'s treatment of *Quirin* and *Yamashita* thus reaffirms that the key to the Court's

decision was the prisoners' status as aliens outside U.S. sovereign territory, and demonstrates that petitioners' efforts to rely on *Quirin* and *Yamashita* (and habeas petitions filed by citizens) are misguided. See R. Br. 15-16.

2. Similarly, if U.S. jurisdiction or control over foreign territory, and not sovereignty, were the benchmark, then the prisoners in *Eisentrager* themselves would have been entitled to judicial review of their habeas claims. The Landsberg prison in Germany was unmistakably under the control of the United States when Eisentrager was held there. Indeed, it is hard to imagine that the United States would ever detain military prisoners in a facility over which it *lacked* control. The Court in *Eisentrager* noted that the prisoners at issue in *Eisentrager* were under the custody of the "American Army officer" who was the "Commandant of Landsberg Prison" and it referred to the hundreds of cases —like *Eisentrager*—involving "aliens confined by *American* military authorities abroad." 339 U.S. at 766, 768 n.1 (emphasis added). Justice Black was even more direct in his dissenting opinion, stating that "[w]e control that part of Germany we occupy." *Id.* at 797. The United States controls Guantanamo subject to the terms and conditions of its Lease Agreements with Cuba, but—as this Court made clear in *Eisentrager*—in the absence of *sovereignty*, the exercise of such control does not entitle the aliens held at Guantanamo to the privilege of litigating in U.S. courts.[12]

[12] The conclusion that the United States exercised control over the Landsberg military prison is further demonstrated by the instruments governing the allied occupation of Germany. Paragraph 2(i) of the Occupation Statute (C.A. App. 332) explicitly reserved "[c]ontrol" over the "German prisons" to the occupying powers. And the United States, through the U.S. High Commissioner for Germany, exercised exclusive control as an occupying force over the American zone in Germany, including the Landsberg prison. See Staff of the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess., *Documents on Germany, 1944-1970*, at 165 (Comm. Print 1971) (Charter of the Allied (Western) High Commission for Germany, para. 3, signed by the Foreign Ministers of France, the United Kingdom, and the United States, June 20, 1949).

3. This Court has recognized that leased U.S. military installations abroad are outside the sovereign territory of the United States, even though such facilities are vital to the conduct of the United States' foreign affairs abroad precisely because they provide an area removed from the sovereign territory of the United States, yet indisputably within the control of U.S. armed forces. In *United States* v. *Spelar*, 338 U.S. 217, 219 (1949), the Court held that a U.S. military base leased in Newfoundland was "subject to the sovereignty of another nation," not "to the sovereignty of the United States," and therefore fell within the "foreign country" exception to the Federal Tort Claims Act. The base in *Spelar* was governed by "the same executive agreement and leases" as the U.S. military base in Bermuda. *Id.* at 218. This Court in *Vermilya-Brown* recognized in turn that the United States' rights over the base in Guantanamo are "substantially the same" as its rights over the base in Bermuda. 335 U.S. at 383; see Pet. App. 15a.

4. Petitioners' reliance on the "Insular Cases"—in which the Court has recognized that certain constitutional rights or privileges may extend to inhabitants of American territories or insular possessions—is misplaced. Guantanamo is not a U.S. territory, or even an unincorporated territory like Guam or Puerto Rico. The Constitution gives to Congress the power to recognize and regulate American territories. See U.S. Const. Art. IV, § 3, Cl. 2; *Torres* v. *Puerto Rico*, 442 U.S. 465, 469-470 (1979). Congress has exercised that authority and an entire title of the United States Code (Title 48) is devoted to "Territories and Insular Possessions."[13]

[13] When Congress recognizes U.S. territories, it carefully delineates the rights and privileges that extend to the residents of such territories. See, *e.g.*, 48 U.S.C. 734 ("statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Puerto Rico as in the United States"); 48 U.S.C. 737 (stating that "rights, privileges, and immunities" of U.S. citizens shall be respected in Puerto Rico "to the same extent as though Puerto Rico were a State of the Union"); 48 U.S.C. 1421b(*l*) ("Bill of rights" governing Guam; includes "privilege of the writ of habeas corpus"); 48 U.S.C. 1561 ("Bill of rights" governing Virgin Islands;

Guantanamo is not addressed in Title 48 because it is not a U.S. territory or insular possession. It is a leased military base on foreign soil, just like numerous other military bases occupied by the United States around the world. See *Spelar*, 338 U.S. at 219; *Vermilya-Brown*, 335 U.S. at 385.

Guantanamo is not comparable to the former Trust Territory of Micronesia. See Pet. App. 16a-17a; 48 U.S.C. 1901 *et seq.* Quite unlike the Trust Territory of Micronesia, the United States occupies Guantanamo pursuant to a lease that explicitly recognizes that Cuba retains sovereignty over Guantanamo. By contrast, no other sovereign authority existed at the time of the appointment of the United States as administrator of the Micronesia Trust Territory. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665. Likewise, the United States' operation of Guantanamo does not share any of the civilian governmental attributes of its special role with respect to the Trust Territory in Micronesia, and responsibility to "nurture the Trust Territory toward self-government." *Gale* v. *Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980); see 48 U.S.C. 1681(a).[14]

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includes "privilege of the writ of habeas corpus"); 48 U.S.C. 1661, 1662, 1662a (recognizing U.S. sovereignty over Tutuila, Manua, eastern Samoa, and Swains Island; stating that amendments to the constitution of American Samoa, as approved by the Secretary of the Interior pursuant to executive order, and which includes privilege of the writ of habeas corpus, may be made only by Act of Congress); 48 U.S.C. 1801 (historical and statutory notes) (approving Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America and incorporating Constitution of the Northern Mariana Islands which includes privilege of writ of habeas corpus). Congress has not enacted any such legislation with respect to Guantanamo.

[14] See, *e.g.*, Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986) (establishing the Northern Mariana Islands as U.S. territory); J. Res. of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America); Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265 (establishing a U.S. District Court in the Northern Mariana Islands).

Nor is Guantanamo comparable to the Panama Canal Zone, which, until the United States withdrew from the Zone, was viewed as an unincorporated territory of the United States and was the subject of extensive legislation. See 48 U.S.C. 1301 *et seq.* (1946). The Fifth Circuit held that Congress had extended some constitutional rights to the Panama Canal Zone, but the exercise of jurisdiction in those cases was based on the fact that Congress had established a U.S. federal district court of the Canal Zone with appellate review by the Fifth Circuit. See 22 U.S.C. 3841(a) (repealed).[15] Obviously there is no analogous district court with jurisdiction over Guantanamo, nor has Guantanamo ever been treated as an unincorporated territory of the United States. Moreover, as Judge Graber explained in *Gherebi*, the differences between the language of the Guantanamo Lease Agreements and the Panama Canal Treaty if anything only bolster the conclusion that *Cuba* retained sovereignty over Guantanamo. 352 F.3d at 1311 (dissenting).[16]

5. When the United States is occupying a foreign land for general military purposes, the Court has held that the occupied area remains foreign soil and "cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U.S. 109, 119 (1901). In *Neely*, this Court considered the military's occupation and control of Cuba following the

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[15] See *United States* v. *Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971), cert. denied, 406 U.S. 935 (1972); *Government of the Canal Zone* v. *Scott*, 502 F.2d 566, 568, 570 (5th Cir. 1974); *Government of the Canal Zone* v. *Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979).

[16] Petitioners cite *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990) (per curiam), for the proposition that crimes committed at Guantanamo may be prosecuted in the U.S. courts. But petitioners overlook that the court in *Lee* exercised jurisdiction over an indictment pursuant to 18 U.S.C. 7 (1988), which extended the criminal law extraterritorially to "crimes committed *outside* the jurisdiction of a state or district court." 906 F.2d at 117 n.1 (emphasis added). That certain laws may apply *extra*-territorially to Guantanamo only reinforces the conclusion that the base lies outside the United States. See Pet. App. 14a.

Spanish-American War—the war that led to the current Guantanamo lease arrangement. When *Neely* arose, "the Island of Cuba was 'occupied by' and was 'under the control of the United States.'" *Id.* at 115. Moreover, the treaty pursuant to which the United States occupied Cuba did not place a limit on the term of such occupancy. *Id.* at 116 (quoting treaty provisions). But this Court nonetheless held that Cuba was "a *foreign* country or territory," *id.* at 115 (emphasis in original), and not, "in any * * * sense, a part of the territory of the United States," *id.* at 119.

If the island of Cuba was not U.S. territory when the United States occupied and controlled it after the Spanish-American War, then *a fortiori* Cuba (including Guantanamo) is not U.S. territory today. That conclusion is underscored by the terms pursuant to which the United States *leases* Guantanamo from Cuba, which place the United States in an inferior position at Guantanamo than the one that it occupied with respect to Cuba at the time of *Neely*. See also *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 614-615 (1850).

C. The Reasoning Of *Eisentrager* Is Not Limited To Aliens Who Are Acknowledged "Enemy" Aliens

1. Petitioners argue that *Eisentrager* is inapplicable on the ground that the detainees in this case are not "enemy" aliens. See AO Br. 26-27. The courts below correctly rejected that argument. Pet. App. 6a-13a; see *id.* at 51a-55a. Although the *Eisentrager* Court referred to the prisoners as "enemy aliens," its holding did not depend on the aliens' status as "enemies." Rather, as explained above, the key to *Eisentrager*'s constitutional analysis was the fact that the aliens had no connection at any time to the sovereign territory of the United States. *Id.* at 11a.

The *Eisentrager* Court emphasized that "the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." 339 U.S. at 777-778 (emphasis added). The dissenters in *Eisentrager* likewise recognized that the Court's decision "inescapably" applied to "any alien

who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared." *Id.* at 796 (Black, J., dissenting). And, as discussed above, that reading of *Eisentrager* is confirmed by this Court's subsequent precedents. See, *e.g.*, *Demore*, 123 S. Ct. at 1730; *Zadvydas*, 533 U.S. at 693; *Verdugo-Urquidez*, 494 U.S. at 269; Part I.B, *supra*.

2. In any event, the Guantanamo detainees qualify as "enemy" aliens for purposes of *Eisentrager* because they were seized in the course of active and ongoing hostilities against United States and coalition forces, and determined by the U.S. military to be enemy combatants. Cf. *United States* v. *Terry*, 36 C.M.R. 756, 761 (A.B.R. 1965) ("The term 'enemy' applies to any forces engaged in combat against our own forces."), aff'd, 36 C.M.R. 348 (C.M.A. 1966). Nothing in *Eisentrager* suggests that an "enemy" alien is limited to a national of a country that has formally declared war on the United States. Although *Eisentrager* noted that under international law all nationals of a belligerent nation become "enemies" of the other upon a declaration of war, see 339 U.S. at 769-773 & n.2, the Court stressed that it did not need to rely on that "fiction" because the detainees were "actual enemies, active in the hostile service of an enemy power." *Id.* at 778. The same is true here.[17]

The "enemy" status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches. See, *e.g.*, *The Three Friends*, 166 U.S. 1, 63 (1897); *Prize Cases*, 67

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[17] Any suggestion that *Eisentrager* applies only to the forces of a nation in a *declared* war with the United States is erroneous and would have irrational consequences. Those involved in the attack on Pearl Harbor would have been eligible for more favorable treatment than Japanese soldiers captured after Congress had formally declared war. Similarly, although lawful combatants of a nation that had declared war could seek no recourse in our courts, the courts would somehow be more accessible to rogue forces or members of an international terrorist network that does not follow the laws or customs of war. Nothing in *Eisentrager* requires that bizarre result.

U.S. (2 Black) 635, 670 (1862). The U.S. military has determined that the Guantanamo detainees are enemy combatants. The President, in his capacity as Commander in Chief, has conclusively determined that the Guantanamo detainees —both al Qaeda and Taliban—are not entitled to prisoner-of-war status under the Geneva Conventions. See White House Press Secretary, *Fact Sheet, Status of Detainees at Guantanamo, supra.*[18] Any effort to look beyond such executive determinations concerning aliens held abroad would conflict with the rationale of *Eisentrager*. See Pet. App. 13a.

D. *Eisentrager* Did Not Bar Jurisdiction Only To Aliens Who Had Been Convicted Of War Crimes

Petitioners attempt to distinguish *Eisentrager* on the ground that the detainees in that case had been convicted by a military commission. See AO Br. 27; R. Br. 32-40. As the district court observed, "[w]hile it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus." Pet. App. 54a (citation omitted).

Moreover, petitioners cannot make a virtue of the relative prematurity of their claims. Under petitioners' reading of *Eisentrager*, aliens captured and held abroad would have access to U.S. courts in the earliest stages of their detention, but not after hostilities had ended and the detainees had been convicted of military charges years later. Nothing in

[18] The Geneva Convention reflects criteria that an organization must meet under the laws and customs of war for its members to qualify as lawful combatants eligible for prisoner-of- war status, including that the organization's members must act in accordance with the laws and customs of war. See GPW, art. 4(A)(2). Neither al Qaeda nor the Taliban meet those criteria. See *Guantanamo Detainees, supra.* In any event, under the laws and customs of war, captured combatants may be detained for the course of the hostilities regardless of whether they are lawful combatants or unlawful combatants. See *Quirin*, 317 U.S. at 30- 31.

Eisentrager supports, much less compels, that counterintuitive result. To the contrary, even the dissenters in *Eisentrager* recognized the profound separation of powers difficulties occasioned by an exercise of judicial jurisdiction "while hostilities are in progress." 339 U.S. at 796 (Black, J. dissenting). Thus, far from curing the jurisdictional defect that this Court recognized in *Eisentrager*, the fact that petitioners in this case are being held while active fighting is still ongoing in Afghanistan and elsewhere and before they have been tried or convicted by a military commission, only demonstrates that this litigation implicates political questions that the Constitution leaves to the President as Commander in Chief.[19]

Petitioners' argument also creates a practical anomaly. The vast majority of aliens who are captured overseas by the military in connection with an armed conflict are detained during the course of hostilities without being charged with any war crime and without being tried or punished by a military commission. Such preventative detention is by definition not penal. See Winthrop, *supra*, at 788 ("Captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure."). The relatively small percentage of aliens who are actually tried and convicted for war crimes often receive severe punishments, including death. Yet, un-

[19] Petitioners ask the courts to opine on the legality of the President's ongoing military operations and to release individuals who were captured during hostilities and who the military has determined should be detained. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch. That is particularly true where, as here, the President is acting with the full backing of Congress. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668-669 (1981). Accordingly, although the courts below did not need to reach the issue, the political question doctrine provides an additional ground for affirming the judgment below.

der petitioners' construction of *Eisentrager*, habeas jurisdiction would *not* be available for those aliens who face the most drastic punishments—including death—as a result of their capture, and such jurisdiction *would* be available for the vastly greater number of aliens who are simply detained during the conflict without charge in order to prevent them from returning to the battlefield to aid the enemy.

E. The Jurisdiction Of U.S. Courts Does Not Turn On A Threshold Determination As To Whether An Alleged Executive Action Would Violate International Law

Petitioners argue (R. Br. 23-29; AO Br. 38-41) that jurisdiction must be available because the Guantanamo detentions allegedly violate the United States' international obligations. That is incorrect. The Guantanamo detentions are fully consistent with applicable principles of international law. But more important for present purposes, the availability of habeas jurisdiction does not turn on a threshold inquiry into the merits of a detainee's claims under international or domestic law.

The federal habeas statute has allowed treaty-based international law claims since at least 1867, and the prisoners in *Eisentrager* themselves raised claims under the Geneva Convention. J.A. 136. Nonetheless, *Eisentrager* held that the U.S. courts lacked jurisdiction over such claims and further emphasized that the Geneva Convention did not create any privately enforceable rights. 339 U.S. at 789 n.14; see Part IV, *infra*. Indeed, it would have made little sense for the *Eisentrager* Court to conclude that the same courts that are closed to constitutional claims nonetheless remain open to claims based on international law.

Petitioners' reliance (AO Br. 38-39; R. Br. 24-25) on the International Covenant on Civil and Political Rights (ICCPR) is particularly misplaced. The ICCPR—a multilateral agreement addressing basic civil and political rights—could not possibly be read to override *Eisentrager*. As Judge Randolph explained in his concurring opinion below,

the ICCPR is a non-self-executing treaty that does not create any privately enforceable rights at all. Pet. App. 22a; *Sosa* v. *Alvarez-Machain*, No. 03-339, U.S. Br. at 27 n.8 (03-339 U.S. Br.). Furthermore, by its terms, the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory. Article 2, paragraph 1 of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within* its territory *and* subject to its jurisdiction the rights recognized in the present Covenant" (emphasis added). That territorial limitation is reinforced by the rule that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it." *Sale*, 509 U.S. at 183; see *id.* at 188.

The same analysis applies with respect to the other sources of international law relied upon by petitioners, including the Geneva Convention itself. See R. Br. 24-25; 03-339 U.S. Br. at 24-31. The Geneva Convention does not create privately enforceable rights, and Congress has never sought to create such rights through implementing legislation. Rather, as this Court recognized in *Eisentrager* with respect to the 1929 Geneva Convention, the "obvious scheme" of the Geneva Convention is that the "responsibility for observance and enforcement" of its provisions is "upon political and military authorities." 339 U.S. at 789 n.14; see Pet. App. 22a (explaining that Geneva Convention "is not self-executing") (citing *Hamdi*, 316 F.3d at 468-469; *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985)); *Huynh Thi Anh* v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Federal Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 203 (1946).

Petitioners' reliance on *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), is similarly misplaced. In that case, the Court observed "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118. The 200-

year-old *Charming Betsy* canon, however, does not provide any basis for overturning *Eisentrager*'s construction of the habeas statutes. Moreover, it would turn the *Charming Betsy* canon on its head to use it to expand the jurisdiction of the U.S. courts over the objections of the Executive and despite Congress's decision not to amend the habeas statutes in the wake of *Eisentrager*. The *Charming Betsy* canon is designed to ensure that federal courts *avoid* interfering in foreign-affairs matters assigned to the political branches. See *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963). As explained in Part III below, holding that U.S. courts have jurisdiction to entertain claims filed on behalf of aliens detained at Guantanamo would place the federal courts into an unprecedented position of reviewing military and foreign affairs decisions that are reserved by the Constitution to the political branches.

F. The APA Does Not Confer Jurisdiction Over Petitioners' Claims

The *Al Odah* petitioners suggest that jurisdiction is available under the Administrative Procedure Act (APA). See AO Br. 21-23. The court of appeals correctly rejected that argument. See Pet. App. 17a-18a. In *Eisentrager*, the Court held that aliens held outside the sovereign territory of the United States lack the "privilege of litigation" in our courts. 339 U.S. at 777. It is true that the claims asserted by the prisoners in *Eisentrager* were made in the context of a petition for habeas corpus, but as petitioners themselves emphasize, habeas—not the APA—is the customary vehicle for challenging an executive detention. R. Br. 13. There is no reason to conclude that the *Eisentrager* Court precluded aliens held abroad from employing the Great Writ to challenge their detention, only to allow them to challenge that detention through the APA. In other words, petitioners' non-habeas claims, *a fortiori*, are precluded by *Eisentrager*.

In any event, there are additional obstacles to petitioners' APA claim. First, it is well-settled that "[c]hallenges to the validity of any confinement or to particulars affecting its

duration are the province of habeas corpus." *Muhammad* v. *Close*, No. 02-9065, 2004 WL 344163, *1 (U.S. Feb. 25, 2004) (per curiam); see *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). Although the *Al Odah* petitioners have argued that they are merely challenging the *conditions* of the detainees' confinement at Guantanamo and not the confinement itself, the district court correctly rejected that contention and reviewed the complaint in *Al Odah* "as if it were styled as a petition for writ of habeas corpus." Pet. App. 47a; see Gov't C.A. Br. 44-50. In any event, the question presented by this Court in this case is explicitly addressed to challenges to the "legality of the *detention*" of aliens at Guantanamo. 124 S. Ct. 534 (emphasis added). Furthermore, because petitioners challenge the conduct of ongoing military operations overseas, their claims are expressly precluded by the APA. See Pet. App. 27a-29a, 47a n.11; Gov't C.A. Br. 51-55.[20]

III. DEPARTING FROM *EISENTRAGER* WOULD RAISE GRAVE SEPARATION-OF-POWERS CONCERNS

Deviating from the principles recognized in *Eisentrager* would raise grave separation-of-powers concerns with respect both to the military's conduct of an ongoing armed conflict overseas and to Congress's responsibility to delineate the subject-matter jurisdiction of the federal courts.

1. a. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918); see *Curtiss-Wright*, 299 U.S. at 319, 320; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). That constitutional commitment is at its height when it comes to the Executive's con-

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[20] The *Al Odah* petitioners also asserted jurisdiction under 28 U.S.C. 1350. As Judge Randolph explained in his opinion for the Court (Pet. App. 17a-18a) as well as in his concurring opinion (*id.* at 19a-29a), Section 1350 does not supply any jurisdiction (or any cause of action) with respect to petitioners' claims that does not otherwise exist in light of the principles discussed above. See also 03-339 U.S. Br. 46-49.

duct of military operations abroad. See U.S. Const. Art. II, § 2, Cl. 1. As this Court observed in *Eisentrager*, 339 U.S. at 788 (citation omitted): "The first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." See also *Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command * * * to repel and defeat the enemy."); *Fleming*, 50 U.S. (9 How.) at 615 (President has authority, *inter alia*, to "employ [the U.S. armed forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy."); *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870).

b. Exercising jurisdiction over habeas actions filed on behalf of the Guantanamo detainees would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters. The detention of captured combatants in order to prevent them from rejoining the enemy during hostilities is a classic and time-honored military practice, and one that falls squarely within the President's authority as Commander in Chief. See *Quirin*, 317 U.S. at 30-31; p. 4, *supra*.[21] Moreover, collecting and evaluating intelligence from captured combatants about the enemy or its plans of attack is a common sense and critical element of virtually any successful military campaign.

[21] In virtually every armed conflict in this country's history, military forces have detained enemy combatants during the course of hostilities and in their immediate aftermath. In the Revolutionary War, U.S. forces detained thousands of British and German citizens as prisoners of war, holding some for years until (or even after) the declaration of peace. See George Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213, at 3, 7, 9, 12, 19-20 (1955). During the Civil War, approximately 96,000 prisoners of war were captured and detained by the Union Army; over 50,000 remained in custody at the time of the Confederate surrender. See *id.* at 41. In World War I, American forces had custody of approximately 48,000 prisoners of war in France between the 1918 armistice and the treaty of peace in 1920. See *id.* at 63. By the end of World War II, U.S. forces had custody of approximately 2 million enemy combatants. See *id.* at 244. Many of the detainees were not repatriated for several years after the conclusion of hostilities. See *id.* at 243-245. During each of these conflicts, only a small fraction of the detainees was prosecuted and punished for war crimes. The vast majority were simply detained during the conflict.

The intelligence-gathering operations at Guantanamo are an integral component of the military's efforts to "repel and defeat the enemy" (*Quirin*, 317 U.S. at 28) in the ongoing military campaign being waged not only in Afghanistan but around the globe. Any judicial review of the military's operations at Guantanamo would directly intrude on those important intelligence-gathering operations. Moreover, any judicial demand that the Guantanamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations—a result that not only would be very damaging to the military's ability to win the war, but no doubt be "highly comforting to enemies of the United States." *Eisentrager*, 339 U.S. at 779.

c. More generally, exercising jurisdiction over actions filed on behalf of the Guantanamo detainees would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas, second-guessing the military's determination as to which captured aliens pose a threat to the United States or have strategic intelligence value, and, in practical effect, superintending the Executive's conduct of an armed conflict—even while American troops are on the ground in Afghanistan and engaged in daily combat operations. That role goes beyond even what the dissenters in *Eisentrager* were willing to reserve for the courts. See *Eisentrager*, 339 U.S. at 796 (Black, J. dissenting) ("Active fighting forces must be free to fight *while hostilities are in progress*.") (emphasis added).

As this Court explained in *Eisentrager*, litigation of habeas claims filed on behalf of aliens held abroad—which inevitably would entail individualized challenges to the circumstances of an alien's capture and his affiliation with the

enemy—also would "hamper the war effort and bring aid and comfort to the enemy." 339 U.S. at 779. As the Court explained, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Ibid.* *Eisentrager* avoids these grave constitutional problems.

d. The breadth of petitioners' arguments would extend the jurisdiction of U.S. courts to habeas petitions filed on behalf of aliens captured and detained on the battlefield in Afghanistan, or anywhere else in the world. Even petitioners, however, are not willing to accept the logical conclusions of their own claims. See Pet. 22 n.14 ("[N]othing in the present litigation implies habeas jurisdiction over Bagram Air Force Base in Afghanistan or other bases in the theater of military operations."). Petitioners seem to recognize that a ruling that the Constitution "follows the flag" for *all* aliens abroad would impermissibly hamper the Executive's conduct of foreign affairs. But there is no manageable and defensible basis, other than sovereignty (*i.e.*, the line drawn by this Court in *Eisentrager* and subsequent cases), for limiting the reach of the arguments that petitioners advance. Certainly, a "de facto control and jurisdiction" test would serve no limiting function at all, because the U.S. military exercises control over the detainees at Bagram Air Force Base as well —and would not detain prisoners in a facility that it did not control.

Moreover, drawing an arbitrary legal distinction between aliens held at a facility, such as the Bagram Air Force Base in Afghanistan, which is controlled by the U.S. military and located outside the sovereign territory of the United States, and aliens held at a facility, such as the Guantanamo Naval Base in Cuba, which is controlled by the U.S. military and located outside the sovereign territory of the United States, would create a perverse incentive to detain large numbers of

captured combatants in close proximity to the hostilities where both American soldiers *and* the detainees themselves are more likely to be in harm's way. Indeed, the Geneva Convention (art. 19, 75 U.N.T.S. 972) itself calls for the movement of prisoners of war "as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."[22]

2. Departing from *Eisentrager* and holding that U.S. courts have jurisdiction over claims filed on behalf of the Guantanamo detainees also would intrude on Congress's authority to delineate the subject-matter jurisdiction of the federal courts, subject to constitutional constraints. See U.S. Const. Art. III, § 1; see also *Snyder* v. *Harris*, 394 U.S. 332, 341-342 (1969) ("If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts."); *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 117 (1981) (Brennan, J., joined by Marshall, Stevens, and O'Connor, JJ., concurring in the judgment) ("Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts.").

To be sure, the Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities. But especially when Congress itself has not attempted to confer such jurisdiction, even in response to this Court's clear recognition of the limits of the habeas statute in *Eisentrager*, the courts are not free to extend their statutory jurisdiction of their own accord in the absence of congressional action. Congress, moreover, is far better situated than the courts to weigh the significant foreign policy and military ramifica-

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[22] The importance of detaining captured combatants at a secure facility located outside an active combatant zone is underscored by the prison uprising that occurred in November 2001 at Mazar-e-Shariff, Afghanistan, which resulted in the deaths of scores of captured combatants as well as one U.S. intelligence officer and members of the Northern Alliance.

tions of extending federal jurisdiction over the claims of aliens held abroad and to address the myriad factors that might enter the equation.[23]

Furthermore, exercising jurisdiction over the actions filed on behalf of the Guantanamo detainees in this case almost certainly would lead to the filing of scores if not hundreds of follow-on actions by the relatives of other aliens held at Guantanamo, as well as, in all likelihood, actions filed on behalf of aliens held by the U.S. military abroad at other American-controlled facilities overseas. Cf. *Eisentrager*, 339 U.S. at 768 n.1 (noting that the court had received habeas petitions filed by "over 200 German enemy aliens confined by American military authorities abroad"). There is no indication that Congress, which is traditionally sensitive to the workload of the federal courts, intended to open the federal courts to the inevitable influx of such claims. Indeed, as discussed above, Congress did *not* enact the amendment proposed in 1951 that would have created such jurisdiction.

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[23] As the government explained to this Court in the brief that it filed in *Eisentrager*:

> Whether, and on what conditions, Congress should extend the same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance from this country of the foreign places of confinement, the availability of witnesses and their amenability to the processes of our courts, the expenses of transportation, the number of potential applicants for the writ, the classes of detained enemy aliens, and the extent of judicial review available abroad, as well as upon our agreements with other powers, the need for expedition and finality in the execution of our international undertakings in punishing war criminals, and the policy demands of the occupation of enemy areas. Other factors to be weighed are whether the remedy shall be available at all times, even during the height of hostilities on foreign soil; the stage at which relief should be allowed, *e.g.*, before or after trial; whether special time and procedural provisions are appropriate; and the scope of review to be afforded in our domestic courts.

49-306 U.S. Br. at 70-71 (citation omitted).

IV. THE GUANTANAMO DETENTIONS ARE SUBJECT TO DIPLOMATIC AND POLITICAL SCRUTINY

1. In *Eisentrager*, the Court stressed that it was "not holding that these prisoners have no right which the military authorities are bound to respect." 339 U.S. at 789 n.14. The Court recognized that the detainees asserted violations of the Geneva Convention of 1929 concerning "the treatment to be accorded captives." *Ibid.* However, the Court concluded that the "obvious scheme" of the Geneva Convention is "that responsibility for observance and enforcement of these rights is upon political and military authorities." *Ibid.* As the Court continued, "[r]ights of alien enemies are vindicated under [the Geneva Convention] only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Ibid.*

Such a dynamic not only is available, but is actively engaged with respect to the Guantanamo detainees. The Guantanamo detainees have been the subject of international attention and diplomatic discussions, including at the highest level of state.[24] For example, U.S. officials have met with Australian officials concerning petitioners Hicks and Habib. See Australian Minister for Foreign Affairs and Attorney General, *Delegation Concludes Successful Talks On David*

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[24] See, *e.g.*, Office of the White House Press Secretary, *President Bush Arrives In England for Three Day State Visit* (Nov. 18, 2003) (noting discussions with the British and with other countries on the treatment of Guantanamo detainees) (<www.whitehouse.gov/news/releases/2003/11/20031118-3.html>); Office of the White House Press Secretary, *Remarks by President Bush and Prime Minister Howard of Australia* (Oct. 22, 2003) (noting discussions between the President and the Prime Minister of Australia on Guantanamo detainees of Australian nationality) (<www.whitehouse.gov/news/releases/2003/10/20031022-11.html>); Office of the White House Press Secretary, *Statement on British Detainees* (July 18, 2003) (discussing meeting between the President and Prime Minister Blair on "the issue of U.K. nationals detained at Guantanamo Bay") (<www.whitehouse.gov/news/releases/2003/07>); see also *President Bush, Prime Minister Sabah of Kuwait Discuss Middle East* (Sept. 10, 2003) (<www.whitehouse.gov/news/releases/2003/09/20030910-4.html>).

Hicks (July 24, 2003) (www.nationalsecurity.gov.au/ag). Similar discussions have taken place between U.S. officials and British officials and, as discussed above, the military has recently announced that it is preparing to transfer the British detainees at issue in this case (Rasul and Iqbal) to the custody of the British government.

At the same time, the Department of Defense has announced that, as a general policy, it does not wish to detain individuals once it has determined both that they no longer have potential intelligence value and that their release would not pose a threat to the United States or its allies. To date, more than 90 aliens have been released from Guantanamo. Eighty-eight individuals have been released without further custody, and 12 have been transferred to the custody of their own governments (Saudi Arabia, Spain, and Russia) for further detention or prosecution.[25] In addition, six detainees

[25] See, e.g., Dep't of Defense, News Release, *Transfer of Detainees Complete* (Mar. 1, 2004) (seven Russian detainees transferred to Russian government for continued detention) (<www.dod.mil/releases/2004/nr20040301-0389.html>); Dep't of Defense, News Release, *Transfer of Detainee Completed* (Feb. 25, 2004) (Danish national released) (<www.defenselink.mil/releases/2004/nr20040225-0365.html>); Dep't of Defense, News Release, *Transfer of Detainee Complete* (Feb. 13, 2004) (one Spanish-national detainee transferred for continued detention by Spanish Government) (<www.defenselink.mil/releases/2004/nr20040213-0981.html>); Dep't of Defense, News Release, *Transfer of Juvenile Detainees Completed* (Jan. 29, 2004) (three juveniles under the age of 16 released to their home country) (<www.defenselink.mil/releases/2004/nr20040129-0934.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (Nov. 24, 2003) (20 detainees transferred to their countries of origin) (<www.defenselink.mil/releases/2003/nr20031124-0685.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (July 18, 2003) (27 detainees released to countries of origin) (<www.defenselink.mil/releases/2003/nr20030718-0207.html>); Dep't of Defense, News Release, *Release/Transfer of Detainees Completed* (May 16, 2003) (one detainee released, four Saudi detainees transferred to Saudi Government for continued detention) (<www.defenselink.mil/releases/2003/b05162003_bt338-03.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (May 9, 2003) (13 detainees transferred for release) (<www.defenselink.mil/releases/2003/b05092003_bt311-03.html>); Dep't of Defense, News Release, *Transfer of Detainees Completed* (Oct. 28, 2002) (four detainees released) (<www.defenselink.mil/releases/2002/b10282002_bt550-02.html>).

have been designated pursuant to the President's military order of November 13, 2001 and several, including petitioner Hicks, have been assigned military attorneys. As discussed above, two Guantanamo detainees have been charged with conspiracy to commit violations of the laws of war.

2. The military's detention of captured combatants at Guantanamo, just like the ongoing combat operations in Afghanistan and elsewhere around the globe, is subject to congressional inquiry. The President has reported to Congress on the ongoing military operations in Afghanistan, including the Guantanamo detentions. See, *e.g.*, *Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, *supra.* Numerous congressional delegations have visited Guantanamo. And members of Congress have questioned executive officials during congressional hearings and in written questions about the military's operations at Guantanamo.

3. The Executive's military operations at Guantanamo and, more generally, its efforts to eradicate the al Qaeda terrorist network and prevent additional terrorist attacks are the subject of intense public scrutiny as well. By constitutional design, the political branches are directly accountable to the people for foreign policy decisions made on their watch. See *Chicago & S. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948). In that regard, the political branches occupy an entirely different position in our constitutional system than this Court. As the number of amicus briefs filed in this case underscore, the Guantanamo detentions are subject of intense public interest in this country and, indeed, the international community. The political branches ultimately are accountable for the conduct of the ongoing military campaign against al Qaeda and protecting the Nation from additional attacks. The military operations

at Guantanamo are a critical component of the Executive's efforts to accomplish those objectives.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2004